UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LAWRENCE DAIGLE,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Docket No. 97-254-B***
	)	
KENNETH S. APFEL,	)	
Commissioner of Social Security,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal requires the court to determine whether the Commissioner properly evaluated the plaintiff's allegations of pain in making a determination of non-disability. I recommend that the court affirm the Commissioner's decision.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5. 6 (1st Cir. 1982), the Administrative Law Judge found that the plaintiff had not engaged in substantial gainful activity since March 15, 1990, Finding 2, Record p.18; that he had residuals of fractures of the left midshaft tibia and fibula, as well as hardware and residuals of a right knee injury, impairments that

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 12, 1998, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

were severe but which did not meet or equal any of the impairments listed in 20 C.F.R. § 404, Subpart P, Appendix 1, Finding 3, Record p.18; that he was unable to perform his past relevant work as a carpenter, mason and paper factory worker, Finding 6, Record p. 18; and that, based on an exertional capacity for sedentary work as well as the plaintiff's age (37), education (high school equivalency) and work experience, application of the Medical Vocational Guidelines, 20 C.F.R. Part 404, Subpart B, Appendix 2 (the "Grid"), directed the Administrative Law Judge to conclude that the plaintiff was not disabled, Findings 8-10, Record pp. 18-19. The Administrative Law Judge also determined that, for purposes of the plaintiff's SSD claim, he met the required disability insured status only through March 31, 1994. Finding 1, Record p. 18. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir.1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales,* 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff's sole contention in the instant proceeding is that an erroneous assessment of one piece of evidence by the Administrative Law Judge fatally undermines his negative assessment of the plaintiff's credibility. The Administrative Law Judge found the plaintiff to be "not entirely credible" on the subject of pain

> in light of the medical history and in light of the testimony of the medical expert present at hearing regarding the medical evidence in file. The claimant indicated that he took Percocet for pain in his legs, but there is no indication from any treating physician, of why or even if this level of painkiller was prescribed. The claimant's treating orthopedist, Dr. Lawsing, mentioned that his left leg fracture was healing on course in March, 1996 (Exhibit 10F). There are no later records from Dr. Lawsing or any other physician to the contrary. The claimant's allegations of pain are not entirely substantiated by medical evidence.

Record p. 16. In challenging these findings, the plaintiff directs the court's attention to the following evidence: a physician's treatment notes indicating that the plaintiff received a prescription for Tylox in 1986 following knee surgery, *id*. at 150-52; written instructions issued to the plaintiff by the emergency department of Eastern Maine Medical Center in 1993, following treatment for what is identified therein as a "broken radius," noting a prescription for Tylenol with codeine, *id*. at 172; and a discharge summary dictated by James F. Lawsing, III, M.D., concerning the plaintiff's admission to Eastern Maine Medical Center on December 19, 1995, *id*. at 185-87. The latter noted the plaintiff's treatment for fractures to the tibia and fibula and indicated that Lawsing had prescribed Percocet. *Id*. at 185, 187.

The Social Security Administration's regulations make clear that pain is among those symptoms the Commissioner must evaluate in determining a claimant's work capacity. *See* 20 C.F.R. §§ 404.1529, 416.929. A baseline requirement is the existence of "medically determinable impairment(s)" that "could reasonably be expected to produce the pain . . . alleged." 20 C.F.R. §§ 404.1529(b), 416.929(b). There does not appear to be any doubt that such medically determinable impairments are established on this record. *See* Record at pp. 14-15 (setting forth administrative findings concerning plaintiff's 1986 knee surgery, 1995 tibia-fibula fractures with attendant insertion of rod in affected area and 1995 x-rays showing "mild disc space narrowing . . . with spondylosis);

but see id. at 15 (finding no indications of current significant back problem, no indication that 1993 wrist fracture had not healed satisfactorily, and no evidence of "medically determined neurological impairment" despite possible indications of head injury in 1995 accident). Therefore, the Administrative Law Judge was obligated to "evaluate the intensity, persistence, and limiting effects of the individual's symptoms to determine the extent to which the symptoms limit the individual's ability to do basic work activities." Social Security Ruling 96-7p, *reprinted in West's Social Security Ruling Service*, Rulings 1983-1991 (Supp. 1997) at 120. "[A]n individual's symptoms can sometimes suggest a greater level of severity of impairment than can be shown by the objective medical evidence alone." *Id*. Thus, the regulations obligate the Administrative Law Judge to consider the following additional evidence to the extent it is of record:

> 1. The individual's daily activities;
>
> 2. The location, duration, frequency, and intensity of the individual's pain or other symptoms;
>
> 3. Factors that precipitate and aggravate the symptoms;
>
> 4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
>
> 5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
>
> 6. Any measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
>
> 7. Any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

Id. at 121.

> The adjudicator must then make a finding on the credibility of the individual's

> statements about pain or other symptoms and their functional effects. . . . When evaluating the credibility of an individual's statements, the adjudicator must consider the entire case record and give specific reasons for the weight given to the individual's statements.
>
> The finding on the credibility of the individual's statements cannot be based on an intangible or intuitive notion about an individual's credibility. The reasons for the credibility finding must be grounded in the evidence and articulated in the determination or decision. It is not sufficient to make a conclusory statement that "the individual's allegations have been considered" or that "the allegations are (or are not) credible." It is also not enough for the adjudicator simply to recite the factors that are described in the regulations for evaluating symptoms. The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight.

Id. at 122.

Three realities emerge upon careful review of the administrative record. First, it is clear from the decision itself that the Administrative Law Judge understood and followed the requirements of Ruling 96-7p and the regulations cited therein. Second, to the extent the Administrative Law Judge thought the plaintiff had not received a prescription for Percocet, the Administrative Law Judge was mistaken. However, the third reality is that any error was harmless because substantial evidence in the record, of the sort the Administrative Law Judge was obligated to consider under Ruling 96-7p, supports his determination that pain did not affect the plaintiff's capacity for sedentary work at any time relevant to the application for SSD and SSI benefits.

At hearing, the plaintiff gave the following testimony concerning the pain he experienced from the time of his 1993 accident, which apparently involved an all-terrain vehicle:

> [Claimant's Representative]: [W]hat kind of pain are you in? What kind of pain do you have? First I want to look at this, after the ATV accident, from the time you stopped working up until the ATV accident and forward. But before this, before you had the automobile accident in . . . December [1995].

[Plaintiff]: Uh-huh.

[Representative]: Were you having problems with pain?

[Plaintiff]: Yes, my legs would knot up on me, and the doctor said — both legs would knot up on me and the doctor said it was possible sciatic nerve. And he give me cortisone shots and that seemed to help. And then it, it would just start over again.

[Representative]: Okay.

[Plaintiff]: You know, it's painful. I get — it goes right straight through me. Like lightning.

[Representative]: What do you do for pain relief?

[Plaintiff]: Well, I — not much. Aspirins, and codeine. And I had a friend that's got his leg cut off and he gets a prescription and I, you know, I get a couple of codeine, and tylenol III's from him. My doctor, he don't want to give them to me because he thinks that you get hooked on them.

[Representative]: Okay. Before you automobile accident, from April of '93 to December of 1995, if you had to measure your pain on a scale of zero to ten on a daily basis, zero being none at all, ten being the worst you can imagine, where would you place it?

[Plaintiff]: I'd say about, it goes from seven to ten.

Record at 36-37. Asked substantially the same question concerning the pain he experienced subsequent to his 1995 accident, expressed on a zero-to-ten scale, the plaintiff testified that his pain was "probably about the same, seven to . . . ten." *Id*. at 38-39. The plaintiff later testified that he has difficulty walking "after a while" because his "legs start to knot up" and his "hips hurt," that "one side" of his leg is "completely numb from the knee down," and that the fingers of his right hand were numb. *Id*. at 46. He also suggested that he experienced discomfort if he sat in one place for an unspecified period of time. *Id*. at 47.

On the subject of pain medication, the record beyond the plaintiff's hearing testimony

contains three relevant statements, the first two bearing the date of February 16, 1996. In an "Activities of Daily Living" form submitted to the agency, the plaintiff reported that he was taking Percocet. *Id*. at 120-21, 127. A disability report, which appears to have been completed in part by the plaintiff and in part by an interviewer, contains a reference to Percocet that appears to have been entered by the plaintiff. *Id*. at 96, 98, 101, 103. An undated "Claimant's Statement When Request for Hearing is Filed and the Issue is Disability" form, apparently completed by the plaintiff, reports that the plaintiff was taking Advil and Tylenol. *Id*. at 110-11. The record reflects that the plaintiff made his hearing request on September 11, 1996. Id. at 72.

What this evidence makes clear is that the plaintiff began taking Percocet following his December 1995 accident and discontinued it at some point between February and September of 1996. This is entirely consistent with the medical advisor's hearing testimony that the leg the plaintiff injured in the 1995 accident was "healing and . . . healing well enough so they plan to remove all the hardware." *Id.* at 53. The expert witness opined that "[i]t may take a little longer [for the injured leg] to acquire completely its strength, but I suspect that will happen. It doesn't appear to involve a joint. You know, I think that the prognosis here isn't bad." *Id*. The Administrative Law Judge's decision makes clear that the testimony of the medical advisor, in combination with the plaintiff's documented medical history, formed the primary basis for the finding that the plaintiff's statements concerning his limitations were not entirely credible. *See id.* at 16. Thus, the challenged credibility determination is sufficiently grounded in the evidence notwithstanding any mischaracterization by the Administrative Law Judge of the plaintiff's history of taking Percocet.

A case cited by the plaintiff, *Adie v. Commissioner, Social Security Administration*, 941 F.Supp. 261 (D.N.H. 1996), is distinguishable. The court in *Adie* noted an extensive series of

discrepancies between the evidence of record, including the objective medical evidence and the plaintiff's testimony as to the pain medications he was taking, and the Administrative Law Judge's findings in connection with an unfavorable credibility determination. *Id*. at 267-70. As already explained, any mischaracterization committed here is not of sufficient magnitude to require the court to remand for further proceedings.

For the foregoing reasons, I recommend that the Commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of June, 1998.

_____

David M. Cohen
United States Magistrate Judge